No. 83-1904 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BACHE & CO. (LEBANON) S.A.L.,
a Lebanese corporation,

Petitioner,

—vs.—

ABDALLAH W. TAMARI, LUDWIG W. TAMARI, FARAH TAMARI,
co-partners d/b/a WAHBE TAMARI & SONS CO.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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July 20, 1984

17 pp

QUESTION PRESENTED

Should an exception to the rule giving U.S. courts subject matter jurisdiction over trades made on U.S. exchanges regulated under the Commodity Exchange Act (the "CEA") be created where the violations of those laws are perpetrated by foreign branches of U.S. brokers against foreign citizens?

LIST OF PARTIES TO THE APPEAL IN THE SEVENTH CIRCUIT

The names of all of the parties to the appeal in the Seventh Circuit are provided in the caption to the petition. Sup. Ct. R. 21.1(b). There are no subsidiaries or affiliates of the respondents.

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Respondents respectfully request that the petition for a writ of certiorari seeking a review of the interlocutory order of the U.S. Court of Appeals for the Seventh Circuit entered on March 30, 1984, and reported at 730 F.2d 1103 be denied.

STATEMENT OF THE CASE

The petition seeks review of an interlocutory order denying a motion for summary judgment for lack of jurisdiction over the subject matter. As set forth in the complaint and supporting affidavit, the subject matter involves claims under §§ 4b and c

of the CEA, 7 U.S.C. §§ 6b and c. The District Court summarized these charges as follows (547 F. Supp. 310):

> "The Tamaris allege that Bache Lebanon solicited commodity futures orders (apparently for silver, coffee and pork bellies, among other commodities) from them in Lebanon and then transmitted such orders by wire from its Beirut office to Bache Delaware's Chicago offices for execution on the Chicago Board of Trade (the CBOT) and the Chicago Mercantile Exchange (the CME). They further allege that Bache Lebanon made misrepresentations regarding its expertise, gave false advice on market conditions, mismanaged their accounts, and breached its fiduciary duty."

Bache Lebanon was in effect a foreign soliciting arm for Bache Delaware. It is a wholly owned subsidiary of Bache Delaware which in turn executed the orders on the various commodity exchanges regulated under the CEA. As provided by Rule 322 of the New York Stock Exchange, of which Bache Delaware is a member and whose rules bind it, Bache Delaware guaranties the liabilities of Bache Lebanon, under this rule which provides in pertinent part:

> "*All* obligations or liabilities of a corporate subsidiary formed hereunder [including the incorporation of foreign branch offices of member organizations] shall be assumed or guaranteed by the member organization with which it is connected and such member organization shall be *fully responsible* for all acts of such subsidiary." (emphasis supplied)

The wrongful acts here were initiated by the Lebanese branch of a U.S. company and that U.S. company proceeded to carry those wrongful acts to their fruition on the floors of various trading exchanges located within the United States and regulated under the CEA.

THE WRIT SHOULD NOT BE GRANTED

This interlocutory order presents no extraordinary issue compelling a review by this Court at this intermediate stage of the litigation. The ruling presents nothing new and the result reached, far from being unusual, accords with every appellate decision passing upon the scope of subject matter jurisdiction of either the CEA or Securities Exchange Act of 1934 ("SEA").

Indeed, every appellate ruling based upon transactions executed on a U.S. exchange regulated under the CEA or SEA has found subject matter jurisdiction irrespective of the nationality of the trader or the place of origin of the trade.[1] Conversely, as noted by the District Court here, those decisions which found no subject matter jurisdiction, ". . . all involved foreign securities that were not traded on American exchanges: *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016 (2d Cir. 1975); *Investment Properties International, Ltd. v. IOS, Ltd.*, [1970-71] Fed. Sec. L. Rep. (CCH) ¶ 93,011 at 90,736 (S.D.N.Y.), *aff'd without opinion* (2d Cir. 1971); *Fidenas AG v. Compagnie Internationale Pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 7 (2d Cir. 1979); *Finch v. Marathon Securities Corp.*, 316 F.Supp. 1345, 1347 (S.D.N.Y. 1970) ('It should be noted that [the securities involved] have never been registered in this country—nor have they ever been listed on any of our national securities exchanges or traded on our over-the-counter market.')" 547 F. Supp. at 313.

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1 *E.g. Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Continental Grain (Australia) Pty., Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979). *IIT v. Cornfield*, 619 F.2d 909, 918-19 (2d Cir. 1980); *Straub v. Vaisman & Co.*, 540 F.2d 591, 595 (3rd Cir. 1976); *Des Brisay v. Goldfield Corp.*, 549 F.2d 133, 136 (9th Cir. 1977); *see also, Roth v. Fund of Funds, Ltd.*, 405 F.2d 421, 422 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969) (fact that foreign defendant bought and sold securities on an American exchange, utilizing American broker-dealer, was sufficient to sustain application of United States law governing trading by corporate insiders).

Thus, this decision by the Seventh Circuit accords with the same result reached by the Second, Third, Eighth and Ninth Circuits. In addition, in the *Psimenos* case, which is indistinguishable in all material respects from this case, both the Commodities Futures Trading Commission (the "CFTC") and the SEC, the administrative agencies responsible for enforcing the CEA and SEA, respectively, submitted amicus briefs urging the result reached therein by the Second Circuit.[2] The expertise of administrative agencies in delineating the bounds of subject matter jurisdiction of the Act which Congress has charged it with enforcing is entitled to great weight.[3] Finally, it is not without significance that the brokerage house involved in the *Psimenos* case, E.F. Hutton & Co., did not consider the matter worthy of review by this Court and filed no petition for certiorari seeking review of that interlocutory order sustaining subject matter jurisdiction under the CEA with respect to a trade initiated by a foreign citizen out of the country.

The result reached by this remarkably unanimous line of authorities appears to be correct. Turning first to the "effects" test for international jurisdiction, the bald assertion in the amicus brief submitted by the Futures Industry Association and various commodity exchanges (the "FIA" brief), that "no

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2 The CFTC also submitted an amicus brief in this case to the Seventh Circuit urging affirmance of the result reached in the district court.

3 *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972) (agency determination that certain persons "aggrieved" and therefore within jurisdiction of governing statute "entitled to great weight"); *Escondido Mut. Water Co. v. Fed. Energy Regulatory Com.*, 692 F.2d 1223, 1230 (9th Cir. 1982), *aff'd in part, rev'd in part on other grounds*, 104 S. Ct. 2105 (1984) (agency determination of the "scope" of its governing statute entitled to "great deference"). *See Chemical Mfrs. Assoc. v. Environmental Protection Agency*, 673 F.2d 507 (D.C. Cir. 1982). This principle is in accord with the general rule that the construction of a statute by the agency charged with its execution is entitled to substantial deference. *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981), *Quern v. Mandley*, 436 U.S. 725 (1978), *later app.*, 635 F.2d. 659 (7th Cir. 1980). *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267 (1974).

impact on United States markets occurs if a foreign broker deceives a foreign customer" is wrong, factually and legally. Factually, this was not a foreign broker but rather an overseas trading arm of a U.S. company, whose liabilities have been guaranteed by its U.S. parent. Legally, we submit that the District Court reached the correct conclusion with respect to this "effects" test in holding:

> "As the court reads *Bersch* [*v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975)] and other similar cases, the need for plaintiffs to demonstrate a particularized harm to domestic interests only arises when domestic investors or exchanges are not directly involved. Conversely, in a case such as this, where the challenged transactions involve trading on domestic exchanges, harm can be presumed, because the fraud alleged implicates the integrity of the American market." *Id.* at 313.

Similarly, the Second Circuit in *Psimenos* (722 F.2d 1046) held:

> ". . . Congress did not want the United States to be used as a base for manufacturing fraudulent securities devices, irrespective of the nationality of the victim, *Bersch*, *supra*, neither did it want United States commodities markets to be used as a base to consummate schemes concocted abroad, *particularly when the perpetrators are agents of American corporations.*" (emphasis added).

Indeed, this country, through its courts, has a particularly vital interest in sustaining the integrity of its trading markets dealing in commodities futures. These contracts are pervaded with a transnational character to a far greater extent than are most listed securities. Contrary to the implications contained in the petition of Bache and the brief of the FIA, one of the principal purposes of Congress in creating the CTFC was to protect United States' interests in interstate and foreign commerce in the trading of commodity futures. *See* S. Rep. No.

1131, 93d Cong., 2d Sess. 18-24 (1974); *Board of Trade of the City of Chicago v. Commodity Futures Trading Com.*, 605 F.2d 1016 at 1017-18 (7th Cir. 1979), *cert. denied* 446 U.S. 928 (1980). Its concern over foreign abuses of the commodity markets was evidenced during its deliberations in 1974. So marked was this concern over unregulated foreign trading in the United States markets that Senator Henry Bellmon questioned whether Congress should permit any foreign participation in domestic commodity markets. *Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93d Cong., 2d Sess., pt. 1 at 218 (1974). None of the legislative history indicates an intent to exclude foreigners from the definition of "any person" as used in § 4b of the CEA.

With respect to the "conduct" test for international jurisdiction, it is clear again that a case involving commodity futures presents even stronger reasons for sustaining subject matter jurisdiction than does the usual securities case where jurisdiction is routinely upheld. The nature of a U.S. commodities futures contract is such that the wrongful conduct by definition can only be consummated on the U.S. exchange. The Second Circuit in *Psimenos* emphasized this unique characteristic of a commodities futures contract, stating:

> "The commodity futures contracts involved are domestic: they are created by domestic exchanges and may lawfully be traded only on those exchanges. CFTC Brief at 7; see U.S.C. § 6a (1982); *In the Matter of Wiscope, S.A.* [1977-1980 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 20,785 at 23,199 (CFTC March 19, 1979), *vacated on other grounds sub nom. Wiscope S.A. v. Commodity Futures Trading Commission*, 604 F.2d 764 (2d Cir. 1979) (Whereas securities often 'can be moved from place to place, bought, sold, traded or borrowed outside a central market, a commodity futures contract has no lawful existence or being independent of the designated contract market upon which it is traded.')."

As noted by the District Court, *id.* at 1047, the execution of the orders on the floors of the various U.S. Exchanges was a necessary step in consummating the fraudulent scheme involved in this case.

Faced with this inescapable conclusion, the FIA is reduced to arguing in its amicus brief (p. 9), that a different result would have followed if Bache Lebanon had "bucketed" the orders rather than having them executed on these U.S. exchanges. It argues that by " 'bucketing its customers' orders, Bache Lebanon would have escaped the 'essential step' in any futures fraud and thereby avoid suit in the United States." What the FIA and the various commodity exchanges joining in its brief are in effect arguing is that overseas trading arms of U.S. commodity firms should be free to fleece foreigners on transactions involving actual trades of U.S. futures contracts; otherwise, according to the FIA, these firms will misrepresent to their customers by merely pretending to have the orders executed on U.S. exchanges.

In support of this argument the FIA relies on *Mormels v. Girofinance, S.A.*, 544 F.Supp. 815 (S.D.N.Y. 1982). In that case the foreign broker did, in fact, "bucket" the order. The critical distinction overlooked by the FIA is that the foreign broker in that case was holding itself out as a trading arm of a U.S. broker whereas in actual fact it was not. In this case, however, the misconduct was engaged in by what actually was the real foreign arm of a U.S. broker. As conceded by the FIA (p. 9), such "bucketing" would have explicitly violated § 4b(D) of the CEA, and if Bache Lebanon had engaged in such a practice involving a purported execution on a U.S. exchange, it would likewise have been liable.

CONCLUSION

The interlocutory order sought to be reviewed here reflects the standard application of well-recognized principles of international law necessary to sustain the integrity of transnational dealings consummated on the floors of the U.S. commodity exchanges regulated under the CEA. It represents nothing new, different or unfair and the petition should be denied.

Respectfully submitted,

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July 20, 1984

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 1984, I served by first class mail three copies of the within Brief in Opposition to Petition for a Writ of Certiorari on:

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Sworn to before me this
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Notary Public